

# **Convergence and Divergence in Assessing the Broadcasting Practices of Professional Sports Leagues**

Bill Bachelor, Karen Lent, Mike Cragg and James Keyte\*

## **Introduction**

Who doesn't like a good professional sporting contest? Well, we all know some who are indifferent to that form of entertainment, but for millions of fans across the globe professional sports is 'must-have' content. Indeed, as this article goes to press, the cancellation of sporting events during the Covid-19 pandemic has created a dearth of sports-related content, leaving millions of consumers relegated to watching archival footage of memorable games and sports leagues scrambling to determine plans for a safe return to play. This, in turn, raises the spectre, at least in the minds of some plaintiffs and enforcers, that those who create or distribute that content can exercise some degree of market power, charging large fees to advertisers (for access to viewers) or directly to consumers (for access to the product itself). And if the distribution of that content has some form of exclusivity, for example as to scope across distribution platforms or duration, should that concern be greater? Is this just exploiting the value of high-quality content in a sea of consumer choice? Or, in any event, is there just a so-called monopoly rent

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\* Bill Bachelor and Karen Lent are partners in the Antitrust Group of Skadden, Arps, Slate, Meagher & Flom. Mike Cragg is the chief executive of the Brattle Group. James Keyte is the Director of Global Development at the Brattle Group and the Director of the Fordham Competition Law Institute. The authors would like to thank Andrew Shanahan, an associate at Skadden, and Dan Fanaras, a principal at Brattle, for their invaluable assistance in preparing the article.

created by the valuable content itself, in which case who collects it may not matter so much?

What we do know is that in the United States, there is a long history of litigating professional sports cases, including cases involving broadcast restrictions and related exclusivity.<sup>1</sup> Yet, to this day, legal principles covering broadcast restrictions of professional sports leagues remain unresolved, as highlighted by the most recent *NFL Sunday Ticket Antitrust Litigation* case.<sup>2</sup> Indeed, in the US some courts view broadcast restrictions as the pro-competitive and lawful decisions of leagues as single enterprises or ‘firms’ (subject only to section 2 monopolisation concerns), while a few academics and economists at the extreme maintain that, as to broadcasts, leagues are cartels that carry a heavy burden to justify any form of collective selling of broadcasts, including through exclusivity.<sup>3</sup> These academics would appear to prefer some form of regulatory oversight of the sports themselves, including over content distribution. In any case, in the US, at a minimum, the rule of reason applies to any such restraints and in all instances any form of private equitable or monetary relief must come from the courts.

In the European Union and its Member States, by contrast, while late to the game of assessing the competitive implications of broadcast restraints (including exclusivity arrangements), enforcement agencies have been quite active in addressing exclusivity of sports broadcasting. Interestingly, while the US courts focus on the potential horizontal nature of broadcast restraints (taking almost as a given that vertical exclusivity is inherently procompetitive), the EU and its Member States focus as much on the ‘vertical’ nature of exclusivity – that is, asking whether there is a competitive process for obtaining any exclusives and scrutinising both the scope and duration of any resulting agreements. For these jurisdictions, the inherent efficiencies of league-level contracting for broadcasts are readily apparent, while the scepticism over distribution exclusivity is of paramount concern, even resulting in fairly heavy regulation of sports broadcasting arrangements in some countries.

This article aims to give readers a multijurisdictional overview of the law of various courts and agencies that have addressed professional sports broadcasting arrangements, including exclusive arrangements. It highlights some key areas of convergence, including, for example, the long-established efficiencies that can arise from both league-level broadcasting arrangements

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1 See, eg, *Nat'l Collegiate Athletic Ass'n v Bd of Regents*, 468 US 85, 101 (1984); *Chicago Professional Sports Ltd Partnership v NBA*, 95 F 3d 593 (7th Cir 1996); *Laumann v NHL*, 56 F Supp 3d 280 (SDNY 2014); *Nat'l Football League's Sunday Ticket Antitrust Litig v DirecTV, LLC*, 933 F 3d 1136 (9th Cir 2019).

2 *Nat'l Football League's Sunday Ticket Antitrust Litig v DirecTV, LLC*, 933 F 3d 1136 (9th Cir 2019).

3 See, eg, Roger G Noll, ‘The Organization of Sports Leagues’ (2003) 19 *Oxford Rev Econ Policy*, pp530, 541. Some European national enforcers have suggested a similar view.

and exclusive production and distribution. Yet, what we ultimately see is a significant extent of entrenched divergence in outcomes that arises from different enforcement systems, philosophies and policies, none of which is likely to change any time soon.

### **What product do sports leagues create?**

Perhaps the most important thing to understand about sports broadcasts is that the underlying product is not just a game or random sequence of individual contests. Far from it: leagues differ from ‘barnstorming’ or ‘independent’ sporting contests in that there is consumer demand, often rabidly so, for the race itself in a league context and the chance to make the play-offs and perhaps win a championship. From this perspective, no team or subset of teams can create the venture-level product; moreover, that league product remains the essence of what drives consumer demand, whether the league is ‘closed’ (as in the US with a set number of teams) or ‘open’ (as in many European countries) where teams may fall out of higher leagues in a process of relegation and promotion.<sup>4</sup> In each, the league product is a unique combination of games and races that no team can offer alone, and the creation of the broadcast necessarily requires a product that only the venture itself can create (and, indeed, can be viewed as essentially one product). As the Second Circuit observed when addressing the product offered by a professional sports league, ‘the production of this entertainment requires the joint effort of 30 Clubs; it cannot be produced by any one Club individually or even by a few Clubs’.<sup>5</sup>

The question, then, is how the unique nature of a sports-league product translates into antitrust analysis across jurisdictions? For this we need to assess:

- whether professional sports leagues, under section 1 of the Sherman Act or Article 101 of the Treaty on the Functioning of the European Union (TFEU), may be viewed as single economic firms or instead a group of competing firms (keeping in mind that the single-entity issue in the US has not yet been considered under EU law);
- whether, if collaborations, their coordination on the sale of broadcasts, including restrictions on individual team sale of broadcast rights, is justifiable and on what basis; and
- whether vertical exclusivity of broadcasts is permissible and to what extent.

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4 *Ibid*, Noll.

5 *MLB Props Inc v Salvino, Inc*, 542 F 3d 290, 327–28 (2d Cir 2008).

### **Horizontal considerations**

In the US the main drivers of antitrust challenges to sports-league broadcasting arrangements are class actions seeking a more competitive market in which teams can sell their own packages (alongside a league's package, eg, for out-market fans) and occasionally challenges by a team wishing to sell broadcast rights independent of the league. These plaintiffs seek both treble damages and injunctive relief, the latter of which would substantially modify the historical broadcasting structure of the industry.

The so-called horizontal issues raised in these cases are complex and in many respects highlight a broader ambiguity in US law on how to analyse the internal governance decisions of legitimate collaborations, especially as it relates to the sale of products that only the venture can create.

#### *Horizontal issues in the US*

##### THE SINGLE-ENTITY DEBATE

One of the central threshold issues litigated in the US is whether any exclusive broadcasting arrangement made by a league can in fact be viewed as a horizontal agreement among independent 'firms' – that is, teams – not to enter into their own in broadcasting arrangements for league games. The notion is that leagues are in some sense a collection of fully independent competitors, which, in the absence of the broadest restrictions, are capable of participating as competitors in the marketplace for the sale of broadcast rights for league games. This brings in a whole area of collaboration-related law before considering any so-called vertical distribution arrangements made through league contracting.

The subject area is complicated by the fact that, in 1984, the US Supreme Court addressed whether the National Collegiate Athletic Association (NCAA), in the context of college football, could limit the number of broadcasts and also set the price of broadcasts. In a landmark decision for antitrust jurisprudence generally, the Court found that a per se rule should not apply to entities that must cooperate to some extent to make the products available at all, but that facially anticompetitive conduct could be condemned on a 'quick look' if the conduct lacked plausible pro-competitive justifications (finding that the NCAA's restrictions could not be justified).<sup>6</sup> As described later, however, some courts addressing professional sports leagues have distinguished the NCAA case as not involving a league product made up of economically interdependent teams (themselves created by the league), and therefore not even capable of

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6 *NCAA v Bd Of Regents of the Univ of Okla*, 468 US 85 (1984).

conspiring under section 1 of the Sherman Act. The subject area remains the focus of hotly contested litigation.

To understand a league's perspective on the single-entity issue, one must start with the National Basketball Association (NBA) Chicago Bulls litigation that centred on the Bulls' desire to capitalise on its success and popularity with Michael Jordan in the 1990s. The Bulls wished to broadcast a large number of its games nationally on a cable superstation (which now seems almost quaint), but the league placed limits on how many such games could be broadcast by a team. In the first decision, *Bulls I*, the Seventh Circuit agreed that the restraint could be condemned on an *NCAA* variant of the quick look and that any free-riding concerns could be addressed with a payment by the Bulls to the other teams.<sup>7</sup>

In *Bulls II*,<sup>8</sup> however, Judge Easterbrook delved deeper into the nature of the professional sports-league product and not only rejected the Seventh Circuit's quick-look thinking, but also explained (albeit in dicta) that the broadcast restrictions of a professional sports league may be better viewed as those of a single firm competing with its output in a broader entertainment marketplace:

'The NBA submits [that] it functions as a single entity, creating single product ("NBA Basketball") that competes with other basketball leagues... other sports... and other entertainments... [A]ntitrust law permits, indeed encourages, cooperation inside a business organization the better to facilitate competition between that organization and other producers. *To say that participants in an organization may cooperate is to say that they may control what they make and how they sell it...* Unlike the colleges and universities... the NBA has no existence independent of sports. It makes professional basketball; only it can make "NBA Basketball" games; and unlike the NCAA the NBA also "makes" teams... Moreover, the league looks more or less like a firm depending on which facet of the business one examines... "NBA Basketball" is one product from a single source... [and] is best understood as one firm when selling broadcasts rights to a network in competition with a thousand other producers of entertainment... [emphasis added]' <sup>9</sup>

The case then settled, and little was seen in the area of challenges to league broadcasts for some time.

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7 *Chicago Prof'l Sports Ltd Partnership v NBA (Bulls I)*, 961 F 2d 667 (7th Cir 1992).

8 *Chicago Prof'l Sports Ltd Partnership v NBA (Bulls II)*, 95 F 3d 593, 597–600 (7th Cir 1996). See generally Franklin M Fisher, Christopher Maxwell and Evan Sue Schocten, 'The Economics of Sports Leagues – The Chicago Bulls Case' (1999) 10 *Marquette Sports LJ* 1, 5.

9 *Ibid.*

Then, in 2008, the Seventh Circuit, in *American Needle v NFL*,<sup>10</sup> found that the National Football League (NFL) should also be viewed as a single competitive entity with respect to the group licensing of team intellectual property (IP), which for years had been collectively sold and the value of which is derived directly, if not completely, from participation in the league venture.

The Supreme Court reversed the decision but made clear that it was only addressing section 1 conspiratorial capacity, not whether the restrictions on teams licensing their own IP was anticompetitive or unjustified under the rule of reason. It found that, as to team IP, each team owned that IP and that in the context of licensing team IP (in that case, for licensing hats to manufacturers), teams were best viewed as fully functioning independent competitors (or potential competitors), and would have been in the position to function in that way in the absence of the alleged anticompetitive agreement. The Court therefore found that section 1 applied (although, as we describe later, it also explained that many agreements among teams, especially those essential to the venture, could summarily be approved without full rule of reason scrutiny). How the decision may apply to the sale and broadcasts of the venture's games themselves, as in *Bulls II*, was unaddressed.

The sports league broadcasting issue was then put squarely in play in the 2014 case of *Laumann v the National Hockey League*,<sup>11</sup> which also consolidated cases brought against Major League Baseball (MLB). These cases alleged that the National Hockey League's (NHL) and MLB's broadcast arrangements, including exclusive broadcasts regions and restrictions on team-only packages, violated section 1 of the Sherman Act. Although the cases survived motions to dismiss, the District Court found that the plaintiff's economic expert did not offer a reliable model to show that output and price would be better for consumers in the 'but-for world', and therefore excluded the testimony altogether in what is called a Daubert motion. The Court then denied certification of the damages class, because the alleged injury was predicated solely on the expert's excluded model. The case settled with the leagues offering some form of individual team packages but, critically, under league control.

More recently, in *In re NFL Sunday Ticket Antitrust Litigation*,<sup>12</sup> another consumer class brought a section 1 challenge to the long-standing broadcasting arrangements of the NFL, a combination of free TV and an exclusive out-of-market package through DirectTV. The District Court,

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10 *Am Needle, Inc v NFL*, 560 US 183 (2010).

11 *Laumann v NHL*, 56 F Supp 3d 280 (SDNY 2014).

12 *In re NFL Sunday Ticket Antitrust Litigation*, 933 F 3d 1136 (9th Cir 2019).

distinguishing *American Needle*, found that the product could not be offered by any one team because, in addition to the joint activity needed to create the games themselves, a broadcast required both league and team IP, among other areas of coordination. Thus, while not relying so much on the reasoning of *Bulls II*, the Court cited two post-*American Needle* cases in which restraints were upheld because the product at issue necessarily involved multiple IP rights that had to be coordinated, at a minimum.<sup>13</sup> The District Court also held that the vertical exclusive arrangement with DirectTV was pro-competitive under well-established US case law.<sup>14</sup>

The Ninth Circuit disagreed and reversed the decision. It found, relying on *NCAA* and *American Needle*, that teams, rather than the league, controlled the IP rights for home game broadcasts (based on control of the stadiums) and appeared to equate what it means to be a firm with its particular view of who owns the copyright to live broadcasts. This in turn led the Court to cast the restrictions as more like those in *American Needle* that clearly addressed team IP itself as the product being sold. Interestingly, however, the Ninth Circuit issued a stay of its own order so that the NFL could appeal to the Supreme Court, which has yet to act. If the Supreme Court takes the case (which is discretionary), we suspect that the observations made in *Bulls II* are much more likely to come into play, particularly as no team can make the league product and, hence, can never really be an independent firm in the marketplace as it relates to the games themselves – that is, any ability to ‘sell’ NFL Football as a broadcast product can only come from the venture, which in turn should control how to sell that venture product.

#### IS THE SALE OF LEAGUE GAMES FOR BROADCAST A ‘CORE’ VENTURE ACTIVITY?

A related perspective that would effectively eliminate the horizontality of professional sports broadcasts is the notion, anticipated in *Bulls II*, that the selling of what only the league as a whole can create is a ‘core’ activity of any legitimate venture and, hence, reasonable as a matter of law. In *Dagher*,<sup>15</sup> the Supreme Court addressed a joint venture between Texaco and Shell, which included all of the companies’ production and sales assets, but retained their independent brands. The venture had a committee that set the strategy and price for the outwardly competing brands, which was challenged as per se price fixing in a consumer class action. The District Court viewed the conduct

13 See *Washington v NFL*, 880 F Supp 2d 1004 (D Minn 2012) (regarding NFL game film and images); *Spinelli v NFL*, 96 F Supp 3d 81 (SDNY 2015) (regarding NFL stock photos that included game action).

14 *In re NFL Sunday Ticket Antitrust Litig*, No ML 15-02668-BRO (JEMx), 2017 US Dist LEXIS 121354 (CD Cal, 30 June 2017).

15 *Texaco v Dagher*, 547 US 1, 6–8 (2006).

as proper venture activity, but the Ninth Circuit held that the conduct was per se price fixing, finding that there was no plausible justification for coordinating the pricing of independent brands, even within a venture.

The Supreme Court reversed the decision, finding that the pricing conduct was not only proper but also, even as alleged, a core activity of the venture itself, setting the price of venture products. Hence, the alleged restraints were merely proper ‘internal’ venture decisions. As the Court explained, while the conduct may be price fixing in the ‘literal sense’, it cannot be viewed as price fixing ‘in the antitrust sense’.<sup>16</sup> While the implications of *Dagher* have yet fully to play out, the *Dagher* language is by no means a limiting principle (as opposed to a particular factual setting) and one can fairly assert that any legitimate collaboration, as a matter of law, should be allowed to determine how to market and sell venture-created products. From this perspective, *Dagher* closely mirrors Judge Easterbrook’s explanation that a league must be allowed to control the sale of what it makes – there, the NBA league product – in the form of game broadcasts. To be sure, there will always be squabbles among venture members whose goals may not align perfectly with the overall venture’s interests – in fact, this is precisely what took place in *Bulls II*. But where only the venture can make the product, these intraventure issues and disputes are necessarily the subject of internal contacts or fiduciary duties, where applicable; they are not the stuff of antitrust injury and treble damages.

By mid-2020, the US Supreme Court will have decided whether to grant *certiorari* in the *NFL Sunday Ticket* case and, if it does, we may finally see some much needed clarity concerning the application of section 1 to these and other highly successful collaborations. In the absence of that, at least some US judges are likely to continue to stumble into false positives with what the authors view as highly misguided analyses.

#### RULE OF REASON ASSESSMENT OF PROFESSIONAL SPORTS BROADCASTS

Again, from the horizontal perspective, if a case proceeds beyond single-entity issues, the rule of reason will apply and an antitrust plaintiff will have to jump through a number of hoops to prevail, some quite difficult.<sup>17</sup>

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16 *Dagher*, 547 US at 6–8 (2006).

17 While we do not address market definition and market power here, *Bulls II* is instructive on that topic. See *Chicago Prof'l Sports Ltd Partnership v NBA (Bulls II)*, 95 F 3d 593, 600–01 (7th Cir 1996) (‘Substantial market power is an indispensable ingredient of every claim under the full Rule of Reason’). See also Cragg, Fanaras and Gaynor, ‘The Economics of Professional Sports League Broadcasts’, *Antitrust Magazine*, pp47–58 (fall 2019).

The defendant's 'quick look' in *American Needle*

We have yet to see a fully litigated US rule of reason case for professional sports broadcasting, and in the authors' view it is doubtful that a case is likely to go the distance any time soon. As a threshold matter, *American Needle* highlights that, in the professional sports context, the rule of reason can be applied in favour of the leagues on a quick look if the conduct involves activity that must be done collectively.<sup>18</sup> Indeed, this was the rationale applied in both *Washington* and *Spinelli* as well as by the District Court in *NFL Sunday Ticket*. It makes sense for two distinct perspectives. Most fundamentally, league-game broadcasts require the product to exist in the first place, and if it requires cooperation to make the product at all, the selling of that same product must logically be a venture activity as well. Moreover, and in any event, it does require the cooperation of the league and all the teams to create the broadcasts themselves, both as to IP and the logistics of production, etc. In this respect, the Ninth Circuit's myopic focus on who owns the copyright of the broadcast once made overlooks the cooperation needed to create both the league games and the broadcast in the first place. Hence, a rule-of-reason review of league broadcast restrictions could be quite quick under *American Needle*.

EFFECTS: PLAINTIFF'S CHALLENGE IN PROVING A BETTER 'BUT-FOR WORLD' – THE LAUMANN CASE

Should a court reach the issue of effects under a rule of reason, the major challenge for plaintiffs – as evidenced by the *Laumann* case – is to prove that consumers would be likely to enjoy lower prices and still have all games available in some format and at least at the same quality (including ancillary programming) in the absence of the restrictions. This is far from easy to establish, especially if a court determines that output (the broadcast of games) is already maxed out and available everywhere in some form.<sup>19</sup>

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18 See generally Greg J Werden, 'Antitrust Analysis of Joint Venture: An Overview' (1998) 66 Antitrust LJ 701, 07-08 (endorsing the *Bulls II* analysis as ancillary to venture formation and activity).

19 The NCAA Court, as well as several other decisions, found that the proper measure of output is the number of games produced for broadcast rather than the level of viewership for any particular broadcast format. *Nat'l Collegiate Athletic Ass'n v Bd of Regents*, 468 US 85, 104 (1984). As it is, an NFL fan can view the broadcast of every game should he or she wish to pay for a Sunday Ticket package and NFL Network.

## PRO-COMPETITIVE JUSTIFICATIONS – INVESTMENT INCENTIVES AND FREE-RIDING

From a horizontal perspective, the typical broadcast restrictions involve ensuring: (1) that venture members enjoy the fruits of their investments; and (2) that individual teams do not free-ride on the league's popularity and related investments. The law has long recognised that, as a matter of incentives to form ventures, it is expected that the members of a venture would not compete against their 'progeny', the venture product.<sup>20</sup> It also makes perfect sense that members expect the sale of the venture product to generate group benefits.<sup>21</sup> Likewise, in the league context, in particular, US courts are acutely aware that there are significant incentives to free-ride, especially for popular teams (as in *Bulls II*) that may be enjoying episodic success or for teams (especially in 'closed' ventures) that wish to exploit out-of-market revenue opportunities generated by league popularity and investments. These, too, fit nicely within the *American Needle* quick-look paradigm as well as a traditional rule of reason.<sup>22</sup>

## TRIALS ARE RARE AND WILL CONTINUE TO BE

Ultimately, irrespective of what happens in *NFL Sunday Ticket* on its current appeal, these hurdles make jury trials unlikely, especially when we also consider the available US procedural mechanisms of summary judgment and expert challenges. But as long as professional sports continue to generate the revenues we see in the larger US team sports, and in the absence of clear resolution by the Supreme Court on the threshold issues, US private litigants will continue to take the field and try for the big score.

*The EU perspective on horizontal issues*

Relative to the US, the horizontal inquiry into sports-league broadcasts is fairly straightforward. This, in part, is due to the fact that EU Directorate-General for Competition and Member State agencies can articulate a consistent position on the potential horizon issues without the vagaries of private litigation and outcomes typical of US courts. On this score, compared to the US, there is little to be said, as it appears that EU – within the context of the burden-shifting structure of Articles 101(1) and 101(3) of the TFEU

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20 See *United States v Penn-Olin Charm Co*, 378 US 158 (1964); see also *Madison Square Garden LP v NHL*, No 07 cv 8455 (LAP), slip Op at 20 (SDNY 2 November 2007).

21 See Howard H Chang, David S Evans and Richard Schmalensee, 'Some Economic Principles for Guiding Antitrust Policy Towards Joint Ventures' (1998) *Colum Bus L Rev* 223, 244.

22 *Major League Baseball Props, Inc v Salvino, Inc*, 542 F 3d 290 (2d Cir 2008).

– enforcers tend to treat the leagues as efficiency-enhancing creators of a league product, in part because no team can create the product alone and also because of the readily apparent transactional and IP-enforcement efficiencies of collective licensing.

Most notably, in the landmark *UEFA Champions League* decision, the European Commission (the ‘Commission’) analysed the nature of the League’s joint selling arrangement in which the member clubs pooled broadcasting rights and allowed the League to market them. The Commission readily acknowledged that the joint selling arrangement ‘prevent[ed] individual clubs from individually marketing [their] rights’ and ‘prevent[ed] competition between the football clubs and also between UEFA and the clubs in supplying parallel media rights to interested buyers’.<sup>23</sup> In the absence of the League’s control, the Commission posited, ‘clubs would set prices and conditions independently of one another and in competition with one another’ preventing ‘uniform prices’.<sup>24</sup> Yet, critically, the Commission ultimately accepted the UEFA’s argument that the ‘joint selling arrangement is a prerequisite for the existence of the UEFA Champions League’ and that ‘football clubs are not truly independent competitors’.<sup>25</sup> Further, the Commission agreed that the League allowed for:

- ‘improvement in production or distribution... promoting technical and economic progress’;
- the provision of a ‘fair share of benefits to consumers’; and
- essential restrictions that are ‘indispensable’ for the creation ‘of a league product sold via single point of sale’.<sup>26</sup>

The Commission concluded that while the League’s arrangements were restrictive of competition under Article 101(1) of the TFEU, these factors warranted an exemption under Article 101(3) and therefore did not challenge the horizontal aspects of the League’s activity.

Member States have generally followed suit, declining to challenge the horizontal joint-selling arrangements of leagues offering media rights. Indeed, in at least one jurisdiction, collective licensing is mandatory. In 2010, an Italian regional administrative tribunal annulled a decision critically addressing a football league’s broadcasting sales.<sup>27</sup> The ruling was based on previous actions by the Italian competition agency that had accepted the horizontal element of league joint ventures for pooling of

23 European Commission, 23 July 2003, Case 37.398, *Joint selling of the commercial rights of the UEFA Champions League*, OJ 2003 L 291/25, 114.

24 *UEFA Champions League* at 114.

25 *Ibid*, 125, 130.

26 *Ibid*, 139, 169, 174.

27 Regional Administrative Tribunal for Lazio, 10 May 2010, judgment n 10572/2010, proceeding number A418.

broadcast rights. In 2008 the Italian government had established by decree that satellite football broadcasting rights should be collectively negotiated by the Lega Calcio and not by the single clubs. This, among other examples, highlights the reluctance of European agencies to invoke competition law to challenge the horizontal pooling of broadcast rights by leagues.

### Vertical issues in sports broadcasts

#### *North America*

When we turn to the issue of vertical exclusivity – whether scope or duration – in the US there is little impediment to significant and relatively lengthy exclusive broadcasting arrangements. At a general level, this is because exclusive vertical arrangements in the US have long been viewed as pro-competitive across several dimensions, including, in particular, quality,<sup>28</sup> the fostering of investment<sup>29</sup> and the avoidance of free-riding.<sup>30</sup> Vertical arrangements also generally benefit companies (and consumers) by reducing costs (eg, eliminating double marginalisation) and risks. For all of these reasons, in the US ‘exclusive vertical agreements of reasonable duration that are subject to a competitive award process do not violate the antitrust laws’ for fears of stifling competition between competitors.<sup>31</sup>

Moreover, the US courts have long recognised that ‘competition for the exclusive contract’ is itself evidence of a healthy and dynamic competitive process that ultimately ensures to the benefit of consumers.<sup>32</sup> Courts have recognised that exclusive distribution arrangements between vertically related entities ‘may actually encourage, rather than discourage, competition because the incumbent and other competing suppliers have a strong incentive continually to improve the care and prices they offer in order to secure exclusive positions’.<sup>33</sup> As such, an antitrust plaintiff must allege facts showing exceptional circumstances, such as evidence of significant, long-term market foreclosure or a ‘unique’ opportunity to link two distinct monopolies, to defeat the practicable presumption that exclusive vertical distribution arrangements are beneficial to consumers.

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28 See *Jefferson Parish Hosp Dist No 2 v Hyde*, 466 US 2 (1984).

29 See *Standard Oil of Cal v United States (Standard Stations)*, 337 US 293, 306–07 (1949); *Sewell Plastics, Inc v Coca-Cola Co*, 720 F Supp 1196, 1219 (WDNC 1989).

30 *Ryko Mfg Co v Eden Serus*, 823 F 2d 1215, 1234 and n 17 (8th Cir 1987) (‘overall effect’ of exclusive dealing ‘may be beneficial by focusing the distributor’s efforts on one product line and, in turn, removing the “free rider” threat to the manufacturer’s own selling efforts’).

31 *Spinelli v NFL*, 96 F Supp 3d 81, 119 (SDNY 2015).

32 *Balaklaw v Lovell*, 14 F 3d 793, 801 (2d Cir 1994).

33 *Balaklaw*, 14 F 3d at 799.

As for exclusivity in sports media, there is little specific case law developed in the US, but what there is is generally consistent with these principles. For example, in the recent case *Spinelli v NFL*,<sup>34</sup> the Court determined that exclusive agreements were tolerable owing to their lack of demonstrated foreclosure effects and sending apparent pro-competitive justifications. In *Spinelli*, professional sports photographers sued the NFL over exclusive arrangements with media partners. The photographers claimed that the NFL's complete control over the rights of media generated at its events, coupled with an exclusive licensing arrangement with specific media companies, produced an anti-competitive distribution situation.<sup>35</sup> The Court held, however, that 'because the benefits of exclusive licensing agreements are well-recognized' the arrangements were presumptively legal.<sup>36</sup> The Court explained that an exclusive licensing arrangement violates section 1 only when it will 'foreclose competition in a substantial share of the line of commerce affected'.<sup>37</sup> It found that the photographers failed to allege exceptional circumstances or anything else that suggests that the first and second Associated Press (AP) agreements were something other than standard exclusive licensing arrangements. The relatively short duration of the NFL's contracts also undermined the plaintiffs' assertion of market foreclosure. The NFL's licensing agreements with Getty and AP had exclusivity periods of no more than three years, and the NFL entertained bids for the exclusive commercial licensing rights for NFL and NFL team photos at the conclusion of each agreement's term. The Court held that 'these types of contracts do not foreclose competition and are not anticompetitive as a matter of law'.<sup>38</sup>

Certainly, however, the ultimate approved transaction involving a vertical deal of exclusive professional sports broadcasting is the deal struck in 2015 between the NHL and Rogers Broadcasting.<sup>39</sup> There, Rogers and the NHL entered into a 12-year agreement for \$5.2bn that gave the broadcaster exclusive rights to televise all national NHL games, including the NHL play-offs, across all distribution platforms. Prior to the agreement, the national rights were split between several other broadcasters. By the reckoning of the Canadian Competition Bureau, the agreement was the largest media rights deal in the history of the NHL. However, the CCB approved the deal, concluding that Rogers' new position would not result in a substantial

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34 *Spinelli v NFL*, 96 F Supp 3d 81 (SDNY 2015).

35 *Spinelli*, 96 F Supp 3d at 107.

36 *Ibid*, 116.

37 *Ibid*.

38 *Ibid*, 117.

39 See Competition Bureau Statement Regarding NHL/Rogers Broadcasting Rights Agreement, Competition Bureau Canada (28 October 2015), [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03994.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03994.html) accessed 1 April 2020.

lessening or prevention of competition in the relevant markets. Specifically, the CCB found that many of the same reasons US courts have found vertical exclusive dealing arrangements to be pro-competitive applied in the case of sports broadcasting. The CCB determined that the exclusive vertical dealing arrangement did not allow Rogers to foreclose competition, drawing on the history of Rogers itself, which broke into the industry prior to having any national NHL rights. Additionally, the CCB found that despite NHL live broadcasts arguably being must-have content, this was the case both before and after the new agreement and that multiple alternative mechanisms exist to limit the ability for Rogers to charge supra-competitive wholesale prices. The CCB also determined that there were legitimate pro-competitive benefits to the deal, including investments to be made by Rogers in quality programming and related infrastructure. Moreover, these investments were in the context of increased competition from non-traditional media sources and a changing national appetite for media consumption. Finally, the duration and scale of the deal were viewed in the context of ‘similar trends developing in other countries and in other sports where broadcasters and rights holders are entering into increasingly long term, high-value arrangements’.<sup>40</sup>

### *The EU contrast*

With respect to vertical exclusivity, EU Member States and other non-US jurisdictions have a different take on sports league broadcasts. And because enforcement agencies do not have to go to court in the first instance to obtain relief, most agency ‘wins’ are the result of agreed-upon undertakings that address agency concerns. These can be broken down into a few key areas that roughly track the same issues as in the US, reflecting in a series of actions by the Commission and Member States’ competition authorities concerning exclusive licensing of sports broadcast rights. In all these instances, agencies have taken a more aggressive regulatory stance than courts in the US.

### SCOPE OF EXCLUSIVITY

Exclusive sports-broadcasting decisions by European agencies frequently focus on the scope of the broadcast deals, with concerns over whether the scope of exclusivity is too comprehensive and will therefore foreclose opportunities for rivals. This, in part, is because of the importance of live

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40 *Ibid.*

sports to the modern broadcasting European model. The Commission has recognised that live sports are ‘not only the driving force for the development of pay-TV services, but is also an essential programme item for free-TV broadcasters’.<sup>41</sup> The Commission therefore acknowledged that a large scope of exclusivity can harm competition because ‘if one broadcaster holds all or most of the relevant football TV rights in a Member State, it is extremely difficult for competing broadcasters to establish themselves successfully in that market’.<sup>42</sup>

The most prominent example of regulator intervention into this space occurred in 2003 when the Commission scrutinised the joint selling of media rights of the UEFA Champions League and found that the organisation provided an excessive scope of exclusivity to media partners. One of the UEFA’s powers is to organise and process a joint sale of media rights on behalf of all clubs, which it used to sell media rights to exclusive partners in individual nations. The Commission initiated an investigation under Article 101 of the TFEU to determine whether such a scheme was anti-competitive. The Commission expressed the view that the vertical level was anti-competitive since the collective selling arrangement would result in only one source of supply for all related broadcast content. The Commission believed that this would lead to one ‘single large broadcaster per territory acquiring all free and pay-TV rights, to the exclusion of all other broadcasters’.<sup>43</sup>

After the Commission’s intervention, the arrangements were amended to unbundle the rights, making it possible for multiple broadcasters to acquire broadcast abilities. The Commission then assessed the agreements and concluded that they had the effect of improving the distribution of rights. Specifically, it found that the new arrangement had pro-competitive justifications including:

- ‘a single point of sale’ allowing season-long broadcasting arrangements;
- ‘retained rights’ for clubs to sell non-live media, reducing the scope of media partner exclusivity; and
- time-period limitations of three years ensuring that new vertical deals would be created on a regular basis, further reducing the possibility of a wide and entrenched scope of exclusivity.

National competition authorities have followed the Commission’s lead regarding the prevention of broad exclusivity. For instance, the German Competition Authority, the Bundeskartellamt, recently assessed and approved a new marketing model for the award of media rights for

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41 European Commission, 23 July 2003, Case 37.398, *Joint selling of the commercial rights of the UEFA Champions League*, OJ 2003 L 291/25.

42 *Ibid*, 20.

43 *Ibid*, 19.

the football championship rights for the Bundesliga.<sup>44</sup> The Bundesliga association pre-emptively offered various self-commitments, in particular a so-called single-buyer rule to dispel the authority's concerns about incidentally creating a situation where one bidder would be able to acquire the rights to broadcast all the live Bundesliga matches. The agency was satisfied that these amendments would prevent a wide scope of exclusivity, and declared the commitments offered as legally binding.

#### IS THERE A COMPETITIVE PROCESS?

A second recurring concern that European authorities focus on when assessing the nature of exclusive vertical broadcasting deals is whether there was a competitive process for the acquisition of exclusive broadcast rights. Agencies have continuously required leagues offering exclusive or near-exclusive broadcast packages to have a transparent tendering procedure with maximum competition for the rights in order to level the playing field such that smaller or marginalised companies are not foreclosed from the bidding process. This transparency requirement is often paired with a preference for multiple packages of available rights to ensure that potential purchasers have the opportunity to combine packages to address differing customer agendas.

These issues played out in the Commission's investigation into the distribution of English Premier League broadcast and media rights in 2006.<sup>45</sup> There, the Premier League used the familiar joint venture structure to pool the media rights of its constituent teams and sell those rights to an exclusive partner. The Commission found that the allocation of rights to single partners without a public bidding process violated Article 101 TFEU. It recommended that 'live TV rights be offered in six packages' with balanced slates of matches, and that 'no purchaser – acting alone or in association with others – would be allowed to buy all six packages'.<sup>46</sup> Additionally, the Commission required that the rights marketed by the League would be sold to the highest standalone bidder and that the sales process would be overseen by an independent monitoring trustee, selected by the Commission.<sup>47</sup> Only with these alterations was the vertical broadcasting distribution tolerated.

Similar examples have played out in national markets, with EU Member State agencies also exerting pressure on the bidding process. Nations as

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44 German Competition Authority (Bonn), DFL, 11 April 2016.

45 European Commission, 22 March 2006, Case COMP/C.2/38.173, *Joint selling of the media rights to the FA Premier League*.

46 *Ibid*, 36.

47 *Ibid*.

diverse as Belgium,<sup>48</sup> Germany,<sup>49</sup> Italy<sup>50</sup> and Poland<sup>51</sup> have required processes similar to those mandated by the Commission in the English Premier League case. In nearly all of these instances, the national regulator required some combination of bundled media rights to be available in numerous packages, some requirement for accepting bids regardless of their origins and a condition that no single buyer can obtain all the packages.

#### DURATION: TOWARDS A BRIGHT-LINE TEST

The most striking example of regulator rulemaking by European agencies is the imposition of a nearly uniform durational bright-line rule on sports broadcasting deals, limiting contracts to three years. Both the Commission<sup>52</sup> and national competition agencies<sup>53</sup> have adhered to this three-year standard, with one nation going as far as to label any broadcasting deal exceeding three years as per se anti-competitive and unlawful.<sup>54</sup> The utilisation of a bright-line rule presents a marked contrast to the American applications of standards. Here, the European agencies are attempting to prevent market foreclosure by using a hard-line rule that ignores potential efficiencies that could arise from longer-term deals. The nearly universal decision to utilise this rule reflects agency comfort with strict procedures in the effort to ensure no market entrants or competitors are foreclosed from broadcasting opportunities.

48 Belgian Competition Council, 29/07/2005, Decision n 2005-I/O-40.

49 German Competition Authority (Bonn), DFL, 11 April 2016.

50 Regional Administrative Tribunal for Lazio, 10 May 2010, judgment n 10572/2010, proceeding number A418.

51 Decision of the President of the Office of Competition and Consumers Protection, 29 May 2006, No DOK2-410/2/05/SCH.

52 See European Commission, 23 July 2003, Case 37.398, *Joint selling of the commercial rights of the UEFA Champions League*, OJ 2003 L 291/25 (favourably noting the imposition of three-year limits to contracts); European Commission, 19 January 2005, Case COMP/C.2/37.214, *Joint selling of the media rights to the German Bundesliga* ('The league rights are offered in several packages in a transparent, non-discriminatory procedure. The duration of the agreements concluded with both the agents and the sublicense holders will not exceed three seasons'); European Commission, 22 March 2006, Case COMP/C.2/38.173, *Joint selling of the media rights to the FA Premier League* (imposing limited durations of three years on Premier League broadcasting rights).

53 See Belgian Competition Council, 29 July 2005, Decision n 2005-I/O-40 (applying a maximum duration of three years); German Competition Authority (Bonn), DFL, 11 April 2016 (same). But see Decision of the President of the Office of Competition and Consumers Protection, 29 May 2006, No DOK2-410/2/05/SCH (approving four-year term for broadcast deal).

54 Spanish Competition Commission, 14 April 2010, AVS, *Mediapro, Sogecable y Club de Futbol*, case n 0006/07 (declaring that broadcasting exclusivity agreements signed between a number of football clubs and Mediapro and Sogecable, including the Real Zaragoza agreement, were contrary to the prohibition of anti-competitive agreements contained in Art 1 LDC and Art 101 TFEU if they had a duration of more than three seasons).

## Observations

In many ways the differences we see among jurisdictions assessing sports broadcasts under antitrust laws reflect deep systemic divergence. In the US, in particular, the lure of treble damages and far-reaching injunctive relief incentivise complex and costly private antitrust litigation. Yet, at the same time, the litigation hurdles in the US are quite high: a plaintiff must overcome single-entity-related arguments; actually prove that the-but-for world would result in as much output (at the same quality) but at lower prices; and must overcome historically strong efficiency justifications, including those protecting investment incentives and addressing opportunistic free-riding. Moreover, even if plaintiffs overcame these hurdles, any challenge to broadcast exclusivity runs squarely into extensive case law favouring exclusive distribution arrangements, especially those involving significant investment in quality and ancillary programming. For these reasons, at a minimum, actual decisions addressing professional sports broadcasts are fairly rare, which continues to leave the subject area somewhat unsettled and subject to challenge. It appears that only the US Supreme Court may finally resolve several of these issues.

In the EU and elsewhere, by contrast, the antitrust scrutiny of sports broadcasts is not driven by private litigation, and the antitrust enforcement concerns and objectives appear to be almost flipped. The EU and Member States (as well as jurisdictions in Asia) more or less accept the notion that it is efficient and useful for sports leagues to sell their sports broadcasting collectively and exclusively; hence, the focal point is not on horizontal issues as has been the case in the US. Instead, these jurisdictions centre their concerns on the scope and duration of the distribution arrangement, especially those that appear to be exclusive (express or constructively) for a term greater than three years. Such bright-line determinations are consistent with EU law and policy traditions and certainly bring clarity and predictability to the marketplace. At the same time, one benefit of a common law litigation tradition – especially where relief must come from the courts in the first instance – is that it can often lead to more thorough assessments of asserted foreclosure effects and pro-competitive justifications for the agreed-upon scope and duration of the agreements.

Going forward, can we anticipate some convergence? Not likely, but it is not out of the question. To start, continued interaction among agencies, practitioners, academics and economists can substantially enhance the thinking and analysis relating to the creation and distribution of live sports broadcasts. For example, a few years ago at the Fordham Conference, John Peckman of the CCB gave a presentation on the CCB's approval of a 12-year turnkey exclusive for the broadcast of NHL hockey in Canada – as close

to a must-have product as one might assert. For those EU enforcers and practitioners on the panel and at the conference, it initially was literally a jaw-dropping arrangement to consider. However, as Peckman explained the facts and conclusions resulting from the CCB's investigation, the rationale for approving the deal became clear. The point is not that we have or will see a slew of similar deals in the EU any time soon, but rather that continued discussion and exploration about this important area of consumer demand remains useful; it may just advance the ball in a way that increases welfare from all perspectives, including for leagues, players and fans alike.

